

December 23, 2005

Dee Larsen, Associate General Counsel  
Office of Legislative Research and General Counsel  
W210 State Capitol Complex  
Salt Lake City, Utah 84114

Dear Mr. Larsen:

Having reviewed Mr. Max Miller's assessment of the legality and constitutionality of school vouchers, the Utah State Office of Education (USOE) wanted to provide you with a more complete understanding of the available case law related to vouchers. Additionally, USOE did not want Mr. Miller's incomplete review to be received by you or state legislators and be accepted as complete and factual without a response.

First, Mr. Miller's limited analysis focuses primarily on Establishment Clause issues. It is uncontroverted that any Establishment Clause concerns can be overcome in voucher legislation. What Mr. Miller neglects to discuss, however, is the question reiterated throughout the U.S. Supreme Court's decisions on vouchers and tuition tax credits regarding the availability of vouchers and credits to a broad base of citizens.

Failure to address this issue was one of the fatal flaws of Representative James Ferrin's H.B. 39 Tuition Tax Credit bill in the 2005 session. The Supreme Court has repeatedly stated that, to be constitutional, vouchers/tax credits must be available to a broad class of citizens. The one common thread in the three cases in which vouchers/credits have been upheld by the Supreme Court is the provision of the voucher/credit to parents who want to send their children to private schools **and to parents who choose to stay in public school.**

Mr. Miller asserts that "there are no reported decisions which invalidate vouchers or tax credits as a violation of equal protection." But this is only half of the story. There are no such cases because in the cases that have upheld vouchers or tax credits, the U.S. Supreme Court has noted that the credits or vouchers are available to a broad enough class of citizens that includes, again, parents who want their child(ren) to stay in public school.

Thus, in Mueller v. Allen, 463 U.S. 388 (1983) the Supreme Court upheld a tuition tax credit program from Minnesota which allowed parents to claim a deduction for both **public and private school expenses**. After addressing the Establishment Clause issue, the court stated,

Other characteristics of @ 290.09, subd. 22 [the Minnesota Code section at issue], argue equally strongly for the provision's constitutionality. **Most importantly,**

**the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools** and those whose children attend nonsectarian private schools or sectarian private schools. Private school parents can deduct a certain amount for tuition. Public school parents can also deduct education expenses, such as tuition for summer school, tutoring services, driver education fees, etc.

Id. At 397 [emphasis added]. As Mr. Miller notes, a federal constitutional challenge to a Utah voucher law would most likely be analyzed by the Supreme Court under the Mueller framework (see Miller memo footnote).

In Committee for Public Education and Religious Education v. Nyquist, 413 U.S. 756 (1973) on the other hand, the U.S. Supreme Court ruled New York's tax deduction scheme unconstitutional. In this case, a deduction was available, as in H.B. 39, to private school parents only. (The Court also found the program provided an incentive for parents to send their children to private schools since the deduction was based on income level, not actual expenses).

The U.S. Supreme Court has not abandoned the requirement that a tax credit or voucher program be available to a broad spectrum of parents. In Zelman v. Simmons-Harris, 536 U.S. 639 (2002), the Court upheld Ohio's voucher program. The program allows parents in the Cleveland School District, one of the worst performing in the nation, to receive state aid to attend a private school OR to remain in the public schools and choose tutoring aid. Low-income parents (those below 200% of the poverty line) are given priority and participating private schools cannot charge the parents more than \$250 as their share of the tuition costs.

Not only is the Ohio program available to both public and private school parents, it also creates a disincentive for parents to choose private schools because they receive more government aid if they choose a public charter, magnet or traditional school. (The Ohio program created an additional disincentive for private schools to seek out students through the \$250 limit on the amount of tuition the school could require from the low-income parents).

Arizona learned from these cases. It adopted a tuition tax credit program which provides a \$500 credit for any person who donates to a school tuition organization **and** a \$200 credit for a donation to a public school for extracurricular activities. Arizona's program was declared constitutional by its state supreme court.

The consistent point in each of these cases, new and old, is that vouchers and tax credits are constitutional IF:

1. A broad class of citizens benefits from the program.

2. The legislation permits participation by all schools-public and private.
3. The legislation does not create an incentive for parents to choose religious schools.

We repeat and stand by our analysis that there is no U.S. Supreme Court case in which vouchers/tax credits are upheld **without** a tangible benefit inuring to **both** private school and public school parents (i.e., a voucher/tax credit that can be used by a parent who chooses public schooling). Mr. Miller persistently ignores this consistent and crucial feature of constitutional voucher/tax credit schemes.

Any proposed tax credit or voucher legislation in Utah would have to provide a discernible benefit to public school patrons who choose to remain in a public school. This issue is not addressed anywhere in Mr. Miller's memorandum, but is a key issue in all of the Supreme Court case law regarding vouchers to date. Ignoring the philosophical issues surrounding vouchers, we would hope that any proposed voucher in Utah would meet at least these minimal constitutional requirements.

As to Mr. Miller's argument that the Utah Constitution gives the Legislature the power to designate vouchers as another "program" included in the public education system, we would welcome such an interpretation consistent with the Utah Supreme Court's ruling in Utah School Board's Association v. Utah State Board of Education, 17 P.3d 1125 (2001). In that case, the Court ruled that the Board's power of "general control and supervision" means "the direction and management of all aspects of an operation or business." Voucher legislation must be written consistent with the Board's power to manage all aspects of the program, including sufficient oversight of private schools to ensure proper use of public funds.

If the various provisions of the Utah Constitution are read as Mr. Miller suggests they should be, it would also follow logically that private schools receiving public funding are subject to State Board of Education monitoring, audits, rules, reporting requirements and other supervisory protections. This seems inconsistent with provisions in the 2005 Carson Smith Special Needs Scholarship legislation and previous tuition tax credit/voucher legislation that forbid State Board monitoring and control of private schools not expressly provided for in the bill(s). Despite the Utah Supreme Court's ruling that the Board's power are "plenary," Mr. Miller, and other proponents of voucher/tax credit legislation argue that the Constitution allows the Legislature to expand education funding and create "other programs" like vouchers while at the same time forbidding the State Board of Education from using its plenary powers.

The Utah Constitution cannot be read in such an inconsistent fashion. If the Legislature can create "other schools and programs" under the Constitution, those programs are subject to the plenary powers of the State School Board—powers established by the state Constitution and upheld by the Utah Supreme Court in Utah School Board's Association v. Utah State Board of

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Education. Thus, voucher/tax credit legislation must include recognition of the Board's oversight powers over those schools that accept the voucher/tax credit.

Thank you, in advance, for considering this additional information as you formulate voucher/tuition tax credit legislation for the 2006 Legislative Session.

Sincerely,

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School Law and Legislation

Jean Welch Hill, J.D., Education Specialist  
School Law and Legislation

cc: Representative Stuart Adams  
Greg Curtis, Speaker of the House  
John Valentine, President of the Senate  
Kristina Orme, Utah Attorney General's Office